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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1932

BROOKLYN EASTERN DISTRICT TERMINAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 78–81) is reported in 54 F. (2d) 978. Parts of the report of the Special Commissioner (R. 67–70) and of the opinion of the District Court confirming his report (R. 72–74) are reported in 1931 A. M. C. 341–347.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 18, 1932. (R. 81–82.) Petition for certiorari was filed April 15, 1932. The

writ was granted by this Court May 23, 1932. (R. 82.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner should recover demurrage for the period one of its tugs, damaged partly through the fault of a dredge of the United States, was withdrawn from service for repairs, when two other of petitioner's tugs, regularly employed together with the damaged tug in towing car floats, did all the towing usually done by the three without additional expense of any kind to the petitioner.

2. Whether, if demurrage should be allowed in this case, the finding by the Special Commissioner as to its amount is excessive.

STATUTE INVOLVED

The Act of February 16, 1925 (c. 241, 43 Stat. 1566), provides as follows:

> That the claims of the Brooklyn Eastern District Terminal, a corporation organized and existing under the laws of the State of New York, with its principal place of business in the city of New York, in said State, owner of the tugboat *Integrity,* against the United States for damages alleged to have been caused by collision between the said tugboat and the United States hopper dredge *Raritan,* in New York Harbor, New York, on

or about the 30th day of September, 1920, may be sued for by the said Brooklyn Eastern District Terminal in the United States District Court for the Southern District of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such damages and costs, if any, as shall be found due against the United States in favor of the Brooklyn Eastern District Terminal, or against the Brooklyn Eastern District Terminal in favor of the United States upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal: *Provided,* That such notice of the suit shall be given to the Attorney General of the United States as may be provided by the order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further,* That said suit shall be brought and commenced within four months of the date of the passage of this Act.

STATEMENT

Petitioner filed a libel in admiralty May 7, 1925, under the authority of the Act of February 16, 1925, *supra,* in the District Court for the Southern District of New York to recover damages against

the United States as owner of the dredge *Raritan*, sustained by the steam tug *Integrity* arising out of a collision between these vessels in New York Harbor on September 30, 1920. (R. 2–6.) The United States filed a cross libel to recover for injuries received at the time by the *Raritan*. (R. 9–11.) The trial court, after hearing the proofs of the parties, held both vessels at fault for the collision and determined that the damages to each vessel should be equally apportioned between the two owners, and it appointed a Special Commissioner to determine and report to it the damages suffered by each party. (R. 18.)

A hearing was had before the Commissioner at which testimony (R. 19–66) and other evidence (R. 66–67) was offered. The Commissioner then reported his findings as to the damages sustained (R. 67–70), which included repair bills for the *Integrity* totalling $23,614.57, and a charge of $2,550.00 for supervision of this work and a survey fee. He also allowed the petitioner demurrage for a period of 78 days for the time the *Integrity* was withdrawn from service for repairs, at $150 a day, making a total amount of $11,700 for this item. He found $150 a day to be the "going market rate," evidently, for the hire of such tugs. In explanation of the allowance of the demurrage item the Commissioner stated that, during the period the *Integrity* was laid up, petitioner's other tugs had to "work longer hours, undergoing excess wear and tear, or to neglect available work." The District Court affirmed

the allowance of this item for demurrage. (R. 72–73, 75–76.) Upon appeal the Circuit Court of Appeals reversed the decision of the District Court as to demurrage, disallowing it. (R. 82.) The only question at issue at the present stage of the proceedings is whether petitioner should receive damages for demurrage.

No specific findings have been made, but as the libel was filed and the opinion of the District Court rendered before Admiralty Rule 46½ (281 U. S. 773) became effective, the evidence relating to the demurrage item may be summarized. Cf. *Taxpayers* v. *Jackson,* 283 U. S. 527, 533.

The petitioner was not engaged in commercial towing for hire, but it maintained a fleet of three tugs, one of which was the *Integrity,* for the sole purpose of towing car floats in connection with its business of acting as a transfer medium between points in New York Harbor in conjunction with various railroads. (R. 27–29.) The *Integrity* was out of service for a period of 78 days while the damage resulting from the collision in question was being repaired. (R. 26–27.) During this time petitioner's other two tugs, by working additional hours, performed the towing usually done by all three. (R. 29–30.) This was accomplished without employing additional crews. Petitioner's Superintendent of Equipment and Structure, Mr. Kilpatrick, who testified to the above effect, gave opinion testimony tending to show that by working the other two tugs overtime, they wore out more

quickly, but he stated that it was not possible to estimate the extra cost of this wear although he thought it was materially less than the cost of hiring an additional tug at the regular rate of $150 a day. (R. 30.) There was no definite evidence showing that either of the two tugs had to be repaired because of the extra work or that petitioner incurred any other extra expense or lost any profit because of the *Integrity's* removal from service, although the hearing was held nearly 10 years after the collision. (R. 30–31.) The court below was of the opinion that petitioner was in the same position as it would have been, except for any expenses of overtime which were not proved, had the *Integrity* remained in service. (R. 79.)

Kilpatrick testified that, after the collision, estimates for the repair work were obtained which included bids from five different parties, the top prices being $27,000, and all of the bidders offered to do the repairing within a period of about one month. (R. 21–22.) Petitioner rejected these bids on the advice of its own surveyors because it thought the work could be done for less on a per diem basis. (R. 23–24.) The repairs were made on this plan. (R. 24.)

SUMMARY OF ARGUMENT

In this case the petitioner has been awarded the cost of repairing its tug. In addition it seeks demurrage at the rate of $150 a day for 78 days, the time consumed in repairing the tug. By working

its two other tugs overtime petitioner was able to do all of the work which could have been done during this period by the three tugs. There was no evidence that petitioner lost business, incurred expense, or otherwise suffered damage as a result of the detention. Accordingly, under the principles laid down by this Court in *The Conqueror,* 166 U. S. 110, and followed consistently since that decision by the Federal courts, the petitioner may not recover anything for the detention of its vessel.

Cases involving the "spare boat" doctrine are not in point because in those cases decision went upon the ground that the vessel owner, having incurred expense in maintaining an extra boat to handle his work when boats regularly employed were laid up for repairs, was entitled to recover damages for demurrage while the spare boat was used to replace the injured vessel. In the instant case the petitioner did not maintain a spare boat or incur any expense to replace the service of the injured vessel. An award for demurrage in this case would therefore be more than compensatory, would result in the recovery of money which petitioner has not lost, and would leave it richer than if its vessel had not been injured.

It took 78 days to repair the injured boat in the instant case. The work was done on a per diem basis. Petitioner was under an obligation to minimize its damage and if demurrage was recoverable it should be limited to the period within which the work could have been done under bids for comple-

tion of repairs in about a month which petitioner received and rejected.

In any case the recovery was excessive in allowing demurrage at the rate of $150 a day because it appears that by working the two tugs overtime the cost of handling the work usually done by the injured tug was much less than it would have been to hire a tug in the open market for $150 a day.

ARGUMENT

As a result of the damages received by the *Integrity* in its collision with the *Raritan,* petitioner has been awarded $23,614.57 to cover the cost of repairing the *Integrity* and has also been allowed $2,550 as expenses for supervision and a survey fee in connection with this work. It contends that it should also be awarded $11,700 for demurrage to compensate for losing the use of the *Integrity* during the 78 days it was removed from service. This item was based upon the cost of hiring another tug in the open market at $150 a day for 78 days to take the place of the *Integrity* while being repaired.

As a matter of fact no such additional tug was hired, and by working overtime its other two tugs, which were ordinarily engaged with the *Integrity* in handling petitioner's business of towing car floats, and without hiring additional crews, petitioner was able to do its regular towing work without any loss of profits or without being put to any additional expense during this period. Its officer in charge of the construction and maintenance of

vessels and tug boats testified that the reason the towing ordinarily handled by the *Integrity* was taken care of in this manner was because it was much more economical than to hire an additional tug at the regular daily rate. He did testify that he was of the opinion that the two tugs tended to wear out more quickly because of this overtime work, but he was unable to give any approximation of what the amount of this additional wear might be. He stated further that after the *Integrity* returned to service he did not remember that the other boats had to be laid off to make special repairs required by the extra service, and, although his testimony was given nearly 10 years after the collision, he was unable to state any facts indicating that the two tugs wore out or were wearing out more quickly than they would have if the *Integrity* had not been taken from service for repairs. It might be noted that if, as the witness Kilpatrick stated, the two tugs tended to wear out more quickly because of doing the work ordinarily done by the three, by the same token, the *Integrity*, being relieved from this service for the same period, would have its span of usefulness correspondingly increased.

In determining the damages recoverable in admiralty for injuries to a vessel arising out of a collision, and for other maritime torts, the same principles apply as govern suits at law of like nature for injuries to personal property, and the measure of the indemnity is coextensive with the

amount of the damage suffered. *The Baltimore,* 8 Wall. 377, 385–386; Cf. *Standard Marine Ins. Co.* v. *Assur. Co.,* 283 U. S. 284, 288. Damages in our system of law are based upon the principle of compensation to the injured party so that he will be in as good a position after the injury as if it had not occurred. *Miller* v. *Robertson,* 266 U. S. 243, 257. Under this principle compensation is given *only* for the injury actually suffered. *Ill. Cent. R. Co.* v. *Crail,* 281 U. S. 57, 63. In the instant case petitioner has been fully compensated for the cost of repairing its tugboat, and has failed to prove any other damage arising from the detention of the *Integrity.* Accordingly, we submit that, under settled principles, the action of the court below in disallowing the item of $11,700 for demurrage was clearly correct.

Apparently the last expression of this Court on the question involved here was in *The Conqueror,* 166 U. S. 110, where it was stated (p. 125):

> That the loss of profits or of the use of a vessel pending repairs or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have *actually* been, or may be reasonably supposed to have been, lost, and the *amount of such profits is proven with reasonable certainty.* (Italics ours.)

It was also said in the same case (p. 127)

> The damages must not be merely speculative, and something else must be shown than the simple fact that the vessel was laid up for repairs. * * *

It was held in that case that the evidence failed to establish that the owner of a yacht had been injured in the amount of the damages awarded him as a result of its detention by the Collector of Customs in New York. Evidently the detention lasted from August 27, 1891, to February 3, 1892 (p. 113). The decision in *The Conqueror* followed the rules laid down in *The Potomac,* 105 U. S. 630. In the latter case the question involved was the sum to be allowed for the detention of a vessel while being repaired as a result of damages received in a collision. This Court was of the opinion that sufficient proof of loss arising from the detention had been made and it affirmed the amount awarded in the courts below. However, in discussing the matter it stated (p. 632) that "the burden is upon the libellant to prove the extent of the damages actually sustained by him."

Since the decision in *The Conqueror, supra,* the Federal courts have consistently held that, in order to recover demurrage for detention of vessels injured in a collision, it is necessary to show that loss has actually been sustained as a result of this detention. In *The North Star,* 151 Fed. 168 (C. C. A. 2d), it was held that the disallowance of demurrage for detention of a vessel was proper, as

the vessel had refused to carry cargoes during this period because of the impending close of the shipping season. In *The Winfield S. Cahill,* 258 Fed. 318 (C. C. A. 2d), it was held that a vessel injured in collision should not recover demurrage for the period of her repairs because her owner, a German, "blacklisted" because of the state of war between the United States and Germany, would not have been able to earn anything during the repair period. In *The Wolsum,* 14 F. (2d) 371 (C. C. A. 5th), it was held that, since the evidence failed to show any loss of profits for use of a vessel pending repairs necessitated by a collision, damages should not be allowed for the period of detention. Also, in *Cuyamel Fruit Co.* v. *Nedland,* 19 F. (2d) 489 (C. C. A. 5th), demurrage was disallowed for the period of repairing a vessel because the owner had refused an offer to charter her during this period and there was no evidence that the vessel could have been chartered at the time at a price which her owner was willing to accept, the court reiterating the principle that in all such cases it was necessary to prove damages with reasonable certainty. In *Newton Creek Towing Co.* v. *City of New York,* 23 F. (2d) 486 (C. C. A. 2d), demurrage was not allowed for the period of detention for repairs to a tug because it appeared that the tug belonged to a fleet operated by its owner and that if the tug had not been laid up during this period, it would not have been operated due to the

lack of a demand for such services. Likewise, it has been held that demurrage should not be allowed for embarrassment to the owner's business in general, as no definite sum could be attributed to the detention, but the reasonable hire of a ship actually chartered to take the injured vessel's place was awarded. *The Glendola,* 47 F. (2d) 206 (C. C. A. 2d), certiorari denied, 283 U. S. 857.

Petitioner has cited a number of cases in support of its contention. *The Cayuga,* 7 Blatch, 385, affirmed, 14 Wall. 270; *The Favorita,* 18 Wall. 598; *New Haven Steamboat Co.* v. *The Mayor,* 36 Fed. 716 (S. D. N. Y.); *The Emma Kate Ross,* 50 Fed. 845 (C. C. A. 3d); *The State of California,* 54 Fed. 404 (C. C. A. 9th); *The Providence,* 98 Fed. 133 (C. C. A. 1st); *The Priscilla,* 55 F. (2d) 32 (C. C. A. 1st), certiorari granted *sub nom. Doane-Commercial Towing Co.* v. *Mexican Petroleum Corporation,* 286 U. S. 540, dismissed per stipulation September 26, 1932. All of these cases involved applications of the "spare boat" doctrine. The basis of these decisions is that the owner of the injured vessel, anticipating a time when the vessel would not be available for regular service because of a collision or for other causes, had acquired and maintained an additional vessel for such emergencies so that he would not be required to hire a boat at the regular market rate to take the place of the injured vessel. Since he would have had to pay for such hire if he had not gone to the expense of maintaining the

extra boat, it is thought proper that those who caused the regular boats to be retired from service because of collisions should bear a part of the cost, commensurate with their fault, of the spare boats maintained to do the work of the regular vessels during such repair periods. The damages usually allowed where a spare boat is used are based upon the market rate of hiring a boat during the period of repairs. These cases fall within the principles laid down in *The Conqueror, supra,* that the loss arising from detention must be definitely shown, for the owner is actually out of pocket for the cost of acquiring and maintaining the spare boat used in such emergencies. Thus damages have been proved with reasonable certainty.

The Priscilla, supra, in particular, is relied upon by petitioner. In that case a definite finding was made that there had been ascertainable loss. The presence or absence of proof of such loss is, of course, the distinguishing feature in all of these cases. We believe that case and the instant one are clearly distinguishable on this basis and that the two cases represent the application of the same principles to different facts. In *The Priscilla,* a barge regularly employed in Boston Harbor was damaged. The owner brought one of his barges, ordinarily used about New York, to Boston to handle the business usually done by the damaged barge. Demurrage was allowed in that case for the period the substituted barge was in transit to and used in Boston. The Circuit Court of Appeals

pointed out (55 F. (2d) at p. 38) that, considering the facts, it was a fair inference that the substituted barge, if left in New York, would have been profitably employed. If this were the case, the owner of the barge lost profits by bringing it to Boston which would have been earned if it had been left in New York and, therefore, was entitled to demurrage as compensation.

Petitioner also has cited *The Mediana,* Appeal Cases 1900, 113. In that case a harbor board maintained six lightships. Five of these were regularly employed in the work of the board, the sixth one being kept to take the place of any of the others if they should be put out of service because of damages. The House of Lords held that substantial damages for the loss of the services of the damaged lightship during the time her place was taken by the substituted ship should be allowed. This was a clear case of the application of the "spare boat" doctrine, and the House of Lords appears to have been governed by the same considerations that were present in the "spare boat" cases in this country. *The Mediana* was distinguished from *The City of Peking,* 15 Appeal Cases, 438, in which it was held that loss from the detention of a vessel could only be recovered where there had been actual loss resulting therefrom and reasonable proof of the amount. It is apparent that if the English rule as stated in these cases were applied to the instant case, the result would

have been the same as that reached by the court below, because of the failure of petitioner to prove any actual loss.

Petitioner, characterizing the decision of the court below as arbitrary, untenable, unsound, and not justified by reason or authority, contends that since it operated two of its tugs overtime so as to do the work regularly done by the injured tug, its situation was not materially different from that in the cases where a spare boat is used and demurrage allowed. Reasoning by analogy, petitioner insists that the "spare boat" doctrine must be extended to such cases as this. There is a material difference between the two situations. In the case where a spare boat has been maintained and used the owner has actually paid out of his own pocket money to acquire and maintain the extra boat to take care of the emergency when one of his regular vessels is withdrawn from service. In the instant case petitioner has not shown that there was any extra expense involved in working the two tugs overtime. In overtime cases such as this the insufficiency of proof must always be apparent if the additional cost of overtime operation has not been proven. And to extend the "spare boat" doctrine to such cases would be to destroy the rule upon which it is predicated, namely, that recoverable loss must be proven with reasonable certainty—a rule which is satisfied in the "spare boat" cases by proof of rental value, but which can only be satisfied in

such cases as this by proof of the actual cost of overtime operation. An award to petitioner of $11,700 for demurrage would represent clear gain to it and it would be, to that extent, better off than if the *Integrity* had never been withdrawn from service. This would be a windfall for petitioner, clearly unauthorized by the settled principles regulating the award of damages to which we have adverted above.

Even if damages for detention were recoverable on any theory the award was grossly excessive. The Special Commissioner awarded petitioner demurrage at the rate of $150 a day for 78 days. The repair work was done on a per diem basis because the petitioner's supervisor thought this would be more economical. The cost of repairing the *Integrity* on this basis amounted to $23,614.57 plus $2,550 for supervision and a survey fee. Before deciding to do the work on this plan, petitioner received bids from five different parties who made bids to do the repairing for prices ranging from $25,850 as the lowest to $27,000 as the highest. All of these bidders offered to do the work within a period of about one month. It does not appear whether, if one of these bids had been accepted, it would have been necessary to pay the item of $2,500 for supervision, but the natural inference would be that if the repair work was done by an independent contractor his bid would include all of the regular services necessary to do the repair-

ing. Consequently, if the bids from the independent contractors are compared with the actual cost of the repairing, it seems fair to add the amount of $2,500 for supervision, which would give a total of $26,114.57. If the petitioner intended to seek demurrage in addition to the cost of repairs it is clear that the familiar duty, resting on petitioner to minimize its damages, required it to take the bid of the contractor who would have done the work in the shortest space of time so that the total of the repair bill and the demurrage item should have been as low as possible. If one of the highest bids of $27,000 had been accepted the work would have taken 32 days. Demurrage for this period at $150 a day would be $4,800, making the total damages $31,800 on this basis. If one of the other four bids had been accepted the total cost would have been somewhat lower. The total of the items for repairing, supervision, and demurrage, as claimed by petitioner, is $37,814.57, or approximately $6,000 in excess of the total cost of repairs plus demurrage while the *Integrity* was under repair if one of the bids of the independent contractors had been accepted. No explanation was offered for the excessive period used by the petitioner for repair on the per diem basis. Since all of the five bidders were willing to do the work in less than one-half the time actually taken it seems quite apparent that to allow demurrage for 78 days would be grossly excessive.

If any demurrage at all was allowable, we submit that it should have been limited to a period of not more than 32 days and that the rate of $150 a day allowed was excessive. This was based upon the cost of hiring in the open market a tug capable of doing the work of the *Integrity*. But by the testimony of petitioner's own witness, it appears that it was materially more economical to work the two tugs overtime than to hire a tug for $150 a day. In view of this testimony, to allow petitioner demurrage at the rate of $150 a day would be to give it much more than was due it, even if any demurrage was allowable.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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